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## **Magna Carta, Scotland and Scots Law**

Hector L MacQueen\*

The 800th anniversary of the execution of Magna Carta by King John of England at Runnymede in June 1215 saw the publication of much new writing on the Charter and its significance, both at the time and over subsequent centuries.<sup>1</sup> Debate was renewed about the differences between historians' and lawyers' perceptions of the subject.<sup>2</sup> Discussion generally – and naturally – was from the perspective of English history and law, although also highlighted was the continuing importance of Magna Carta in the USA and the countries of the British Commonwealth. At the anniversary celebrations at Runnymede on 15 June 2015, however, the then Prime Minister, David Cameron, spoke of Magna Carta as British and an object of pride for British people,<sup>3</sup> while a few days later at Lincoln Cathedral, the then President of the UK Supreme Court, Lord Neuberger, remarked that the Charter was “the United Kingdom’s greatest contribution to the world – the rule of law and democratic government.”<sup>4</sup>

These characterisations of Magna Carta as a “British” or “United Kingdom” achievement caused mild surprise in Scotland. It is true that the fifty-ninth of the 61 chapters of the 1215 version of Magna Carta may be translated as follows:

“We [*i.e.* King John] will deal with Alexander, king of Scots, about the return of his sisters and hostages and about his liberties and his rights, in accordance with the form in which we deal with our other barons of England, unless it ought to be otherwise by the charters that we have from his father William, the late king of Scots; and this will be by judgment of his peers in our court.”

But this undertaking to the king of Scots did not reappear in the reissues of Magna Carta in 1216, 1217 and 1225, or indeed in any subsequent version of the charter. The attention given to Scotland in 1215 was thus fleeting and ephemeral. King John’s promise in Chapter 59 was given no effect at all by him, nor did his

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\* FBA, FRSE; Professor of Private Law, University of Edinburgh. This paper has its origins in a research consultancy on the Scottish dimension for the 2015 UK Supreme Court exhibition ‘Chartered Voyage: The Impact of Magna Carta’, held 3 August-25 September 2015. I am grateful to Lord Neuberger (President) and Lord Hodge for the invitation to participate in the preparation for the exhibition, to Jenny Rowe (then Chief Executive of the Court) for guidance on my role, and to John Forsyth, who prepared the exhibition’s texts, for good questions and enjoyable discussions of the whole topic. In my research I received the usual but none the less appreciated courteous assistance of the university libraries of Aberdeen and Glasgow. Further (but not all) debts are acknowledged at relevant points in the footnotes below. But I alone am responsible for errors of fact, judgement, and opinion in the text that follows. All URLs cited were last checked on 18 January 2017.

<sup>1</sup> Much of this writing is cited below. I have also found helpful Nicholas Vincent, *Magna Carta: The Foundation of Freedom 1215-2015* 2nd edn (London: Third Millennium Publishing, 2015).

<sup>2</sup> See not least the several contributions of the Justices of the UK Supreme Court, available in the 2015 section at <https://www.supremecourt.uk/news/speeches.html>.

<sup>3</sup> See <https://www.gov.uk/government/speeches/magna-carta-800th-anniversary-pms-speech>. In part at least the sub-text was the Prime Minister’s wish (shared by his successor) to replace the Human Rights Act 1998 with a “British Bill of Rights”.

<sup>4</sup> Lord Neuberger, “Magna Carta: the Bible of the English Constitution or a Disgrace to the English Nation?”, speech given at Lincoln Cathedral on 18 June 2015, text available at <https://www.supremecourt.uk/docs/speech-150618.pdf>.

successors regard it as having created any kind of new commitment that needed to be honoured. At least so far as John is concerned, this is unsurprising, since almost immediately after he got away from Runnymede he began to seek the papal nullification of Magna Carta eventually obtained in August 1215.

Scotland's lack of significance in the development of the text of Magna Carta after 1215 is however paralleled in reverse. While the Charter was certainly known in Scotland from 1215 on, it had little impact on the development of law, public or private, north of the Anglo-Scottish border in the centuries that followed. Even in the thirteenth century there is no sign at all of even its existence affecting domestic Scottish politics or the kingdom's relations with England. Perhaps the revival of Magna Carta in the country of its origin in the seventeenth century owed something to the absolutist ambitions, or pretensions, of the son of the Scottish king who had come to sit on the English throne in 1603.<sup>5</sup> These led ultimately to the 'wars of the three kingdoms' that scarred all Britain and Ireland between 1640 and 1660. But the Covenanting tradition which was a key feature of religious and political conflict in seventeenth-century Scotland sprang from the inspiration of the Bible and Calvinist theology rather than the example of medieval English kings contracting with their church and baronage.<sup>6</sup> Even after the Anglo-Scottish Union of 1707, the nineteenth-century Chartist movement in Scotland seems not to have found Magna Carta a truly significant source of inspiration despite the launch of the 'People's Charter' being in Glasgow in 1838.<sup>7</sup>

## **Background to and effects of Chapter 59**

The full background to Chapter 59 of the 1215 Magna Carta is to be found in the somewhat tangled tale of Anglo-Scottish relations – or perhaps more accurately, the relationship between the kings of England and Scotland – from at least the period after the Norman Conquest of 1066.<sup>8</sup> The English kings laid claim to, and on a number of occasions before 1215, achieved some form of lordship over their Scottish counterparts, whom they saw as client or sub-kings at best. For example, William I “the Lion”, king of Scots 1165-1214, was captured by English forces at a Scottish siege of Alnwick Castle in Northumberland in 1174, and was then imprisoned at Falaise Castle in Normandy. He regained his freedom under the Treaty of Falaise,

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<sup>5</sup> Dan Jones, *Magna Carta: the Making and Legacy of the Great Charter* (London: Head of Zeus, 2014) ch. 10.

<sup>6</sup> See S. A. Burrell, “The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637”, (1956) 37 *Church History* 338 (note however quotations at p. 348 of references by the leading Covenanting theologian Samuel Rutherford to the “great charter” and “Scotland's charter” to describe agreements about Scotland between God the Father and his Son, said by highly constructive interpretation to be recorded in the books of Ezekiel and the Psalms). I am grateful to Dr Stephen Bogle for helpful discussion on these matters.

<sup>7</sup> There is no index reference to Magna Carta in W. Hamish Fraser, *Chartism in Scotland* (London: Merlin Press, 2010).

<sup>8</sup> The narrative in what follows is based upon the most recently published research on Magna Carta and on Anglo-Scottish relations from 1072 to 1237, although reference to published documentary sources is made on particular points. The main secondary works consulted are: David Carpenter, *Magna Carta* (London: Penguin Books, 2015); J. C. Holt, *Magna Carta*, 3rd edn, edd. John Hudson and George Garnett (Cambridge: Cambridge University Press, 2015); Stephen Church, *King John: England, Magna Carta and the Making of a Tyrant* (London: Macmillan, 2015); A. A. M. Duncan, *The Kingship of the Scots 842-1292: Succession and Independence* (Edinburgh: Edinburgh University Press, 2002); Richard D. Oram (ed.), *The Reign of Alexander II, 1214-49* (Leiden: Brill, 2005); and Richard Oram, *Alexander II King of Scots 1214-1249* (Edinburgh: John Donald, 2012).

by which he retained his kingship but also rendered homage for Scotland and his other lands to Henry II of England (r.1154-1189).<sup>9</sup> This was however rescinded on Henry's death in 1189 in the Quitclaim of Canterbury. For this William paid 10,000 marks to Henry's successor as king of England, Richard I: a useful contribution to funding the latter's then planned and extremely expensive crusade in the Holy Land.<sup>10</sup>

A further aspect of the kings' relationship was that in their own right the Scottish kings held land in England from early in the twelfth century. David I, king of Scots 1124-1153, spent much of his youth at the court of Henry I of England (r.1100-1135) and in 1113 received as a wedding gift from the English king the earldom of the Honour of Huntingdon. In the great conflicts over the English crown which followed the death of Henry I in 1135, David supported the claim of Henry's daughter Matilda. She was also David's niece, his sister Edith having married Henry in 1100.<sup>11</sup> Part of David's price for that support was the earldom of Northumberland. He eventually struck a deal to this effect with Matilda's 16-year old son, Henry of Anjou, at a ceremony in Carlisle in 1149 (where the youth was also knighted by David).

After David's death in 1153 (to be succeeded as king of Scots by his minor grandson, Malcolm IV) and Henry's accession to the English throne in 1154, however, the latter reneged on the arrangements and in 1157 took the earldom back from the Scottish king's brother (William, who would also be his successor in the kingship in 1165). William received the not insignificant lordship of Tynedale in compensation: admittedly "a very privileged frontier regality effectively 'beyond the king of England's power'",<sup>12</sup> but not quite an earldom. The hereditary claim to the earldom was, accordingly, one which William would maintain for the remainder of his long career, and pass on to his own heir, Alexander II. King Henry did allow the Scottish royal family's hold on Huntingdon to continue, and after William became king of Scots, that earldom passed to his younger brother David.<sup>13</sup>

The Scottish kings also maintained a claim to sovereignty over English Cumbria (basically Cumberland and Westmorland) as a unit along with Scottish Cumbria, or Strathclyde (Dumfries-shire, much of Ayrshire, Lanarkshire and Renfrewshire). There may have been from the eleventh century a notion of all Cumbria (however defined) as an appanage of the kingdom of the Scots which was ruled by the heir of the king.<sup>14</sup> David I was styled prince of Cumbria before he became king,<sup>15</sup> and as king he was able to achieve Scottish control of the whole

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<sup>9</sup> For the text of the treaty see E. L. G. Stones, *Anglo-Scottish Relations 1174-1328: Some Selected Documents* (Oxford: Clarendon Press, 1970) no. 1.

<sup>10</sup> Stones, *Anglo-Scottish Relations*, no. 2.

<sup>11</sup> On the significance of this marriage see Richard Oram, *David I: The King Who Made Scotland* (Stroud: Tempus Publishing, 2004), pp. 49-58.

<sup>12</sup> Keith Stringer, "Tynedale: Power, Society, and Identities, c 1200-1296", in Matthew L. Holford and Keith J. Stringer (eds), *Border Liberties and Loyalties* (Edinburgh: Edinburgh University Press, 2010) p. 233 at p. 243 (quotation from *Curia Regis Rolls* vol. 15, nos 960, 1259).

<sup>13</sup> Who held it still in 1215: see K. J. Stringer, *Earl David of Huntingdon: A Study in Anglo-Scottish History* (Edinburgh: Edinburgh University Press, 1985).

<sup>14</sup> Duncan, *Kingship of the Scots*, pp. 60-2.

<sup>15</sup> G. W. S. Barrow, *The Charters of David I* (Woodbridge: The Boydell Press, 1999), no. 15 ("David vero Cumbrensis regionis princeps").

territory before his death (at Carlisle) in 1153. Once again, however, Henry II was able to break the Scottish hold in 1157, and this remained the position in 1215.

### **The Scottish royal house and their English cousins 1124-1286 table here**

This brief summary of some key events shows the kings' relationship in a state of some flux for the century before Magna Carta, with gains and losses on each side in the process very largely down to the rise and fall of individual fortunes. Given the relative size of the two kingdoms, and their very different resources, human and otherwise, the English king always held the upper hand in any face-to-face contest. But he could be distracted by other pressing concerns, such as his territories in France, or civil war, or a desire to go on crusade; and these provided opportunities for the king of Scots to restore or even (as with David I) advance his position.

But the English king showed no particular wish to take general control in Scotland, or to displace the Scottish king altogether. There may well have been realisation south of the border how difficult and costly any hostile take-over would be. No doubt the increasing numbers of landholders who had estates in both kingdoms were a further political force for maintaining peace and not pressing strategies of aggression too hard. And the blood relationships originally created by the marriage of Henry I with David I's sister still counted for something even in the latter part of the twelfth century. Further marriages between the royal houses may have seemed a strategic way of bringing the two kingdoms closer together over time. Finally, it is worth noting the ecclesiastical context which reinforced the Scots' sense of their independence from England. Despite its own lack of an archbishop, the Scottish church never acknowledged the supremacy of the Archbishops of either Canterbury or York, and in 1192 a papal bull declared that the *ecclesia Scoticana* was a 'special daughter' of the Pope alone.<sup>16</sup>

In 1204 John lost Normandy to King Philip Augustus of France; in 1208 his kingdom was laid under papal interdict; and in 1209 he personally was excommunicated by Pope Innocent III. Perhaps almost in reaction to these events, John sought to show his kingship's mastery within the British isles. So far as Scotland was concerned, in August 1209 he forced the aging and increasingly illness-ridden King William into the Treaty of Norham. The texts of the Treaty no longer survive but it is now clear that William was compelled to renew his homage to the English king for his English lands; and, further and much more significantly, William's only son and heir, Alexander (who turned 11 that same month), was also to give homage to John 'as William, king of Scotland, did homage to the lord Henry, king of England', i.e. for the Scottish kingdom as after the Treaty of Falaise in 1174.<sup>17</sup> This was presumably envisaged as taking place on Alexander's accession as king of Scots. As John's man Alexander would be aided in maintaining his lands and dignities after his father's death. This was probably a key issue for William, who had throughout his reign been faced with a dynastic challenge to his kingship from the

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<sup>16</sup> For the dating of the bull (which has been lost) see A. D. M. Barrell, "The Background to *Cum Universi*: Scoto-Papal Relations, 1159-1192", (1995) 46 *Innes Review* 116.

<sup>17</sup> A letter of King John setting out the Treaty's detailed terms (The National Archives E164/27) is published for the first time and translated and discussed in Carpenter, *Magna Carta*, pp. 238-40, 473-5. Quotations here and below are from Carpenter's translation of the letter's original Latin.

descendants of King David's nephew William (the MacWilliams). That threat would have become even more potent if, as must have seemed very likely, his son succeeded him while still a child. The kings and their sons further promised each other lifelong mutual support, while finally there were saved to the Scottish king and his son 'all his liberties and dignities' as well as 'all claim which the same king of Scotland had in Northumberland, Westmorland and Cumberland.'

Further under the treaty, William handed over to John custody of his two legitimate daughters, Margaret and Isabella, with the first-born (Margaret) to marry John's eldest son Henry, and Isabella to be married at John's pleasure but without dishonour. William's negotiations with John's enemy Philip Augustus about the marriages of these self-same daughters was one of the factors triggering John's intervention in Scotland.<sup>18</sup> Three years later, John's overlordship in Scotland was re-emphasised when, in response to a renewed revolt by the MacWilliams, the kings agreed that John might within six years arrange a marriage for Alexander 'as [John's] liege man', although without disparagement to him.<sup>19</sup> Alexander was then knighted by John in London; and was, finally, provided with a group of Brabantine mercenaries to lead in putting down the northern rising in Scotland.

John's dominance of Scotland was at its peak; but his position in his own kingdom of England was about to enter a decline, despite a submission to the papacy in 1213 that led to the lifting of the English interdict and John's excommunication in return for yet another promise never fulfilled, this time to undertake a crusade. A renewed attempt to regain the lost territories in France came first however. But this involved heavy taxation to pay for the necessary armies and alliances. That attracted outright opposition from the baronage of the north of England in particular. They had little to gain from the recovery of Normandy and disliked unaccustomed royal interventions in their lordships. Amongst the king's bitterest opponents was Eustace de Vescy, lord of Alnwick.<sup>20</sup> Married to an illegitimate daughter of King William in 1193, he had already fled to a year's refuge in his father-in-law's court in the summer of 1212 after being accused of plotting John's death. Safe harbour for Eustace north of the border renewed tensions between the kings; but if William here went against the Norham undertakings of mutual support, equally John had done nothing to implement his promises of marriage for William's daughters.

John's position in England was hugely worsened by the defeat of his allies and their armies at the battle of Bouvines in July 1214. In a trial by combat of the English king's claims in France, the judgement of God had gone against him in, as David Carpenter puts it, 'one of the most decisive battles ever fought'.<sup>21</sup> The northern barons, including Vescy and also Robert de Ros lord of Wark (who had

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<sup>18</sup> Church, *King John*, pp. 174-6; Oram, *Alexander II*, pp. 15-18.

<sup>19</sup> Stones, *Anglo-Scottish Relations*, no. 4; G. W. S. Barrow (ed.), *Regesta Regum Scottorum II: The Acts of William I, King of Scots 1165-1214* (Edinburgh: Edinburgh University Press, 1971), no. 505. See also Duncan, *Kingship of the Scots*, p. 111.

<sup>20</sup> On Vescy see J. C. Holt, *The Northerners: A Study in the Reign of King John*, 2<sup>nd</sup> edn (Oxford: Oxford University Press, 1992), pp. 19-22; Ralph V. Turner, "Vescy, Eustace de (1169/70-1216)", *Oxford Dictionary of National Biography* [henceforth ODNB] (2004) [<http://www.oxforddnb.com/view/article/28253>].

<sup>21</sup> Carpenter, *Magna Carta*, p. 287.

been married to another illegitimate daughter of King William since 1191<sup>22</sup>), were prominent in the group that eventually sought to force John's hand in his government of England. They helped prepare the successive documents – the Unknown Charter and the Articles of the Barons – laying the ground for the great charter itself.<sup>23</sup> It was most probably Northumberland barons like Vescy and Ros who enlisted the support of the king of Scots – now Alexander II after the death of his father on 4 December 1214 – by sending him 'the charter of the English barons ... against John king of England'.<sup>24</sup> This was presumably in early June, and certainly before the gathering at Runnymede.

The prospective gains dangled before the Scottish king by the northern barons may have included rescission of his Norham obligation to pay homage for his kingdom. But more certainly they included his regaining full control of his own and his sisters' marriages and the return of the northern counties to his lordship (if not sovereignty in the case of Cumbria). These seem at least implicit in the carefully worded Article 46 of the Articles of the Barons (forerunner of the eventual and rather more explicit Chapter 59 of Magna Carta):

"Let the king deal with the king of Scots for the returning of hostages, and over his liberties and right, in accordance with the terms he comes to with the barons of England, unless it should be otherwise under the charters which the king has, by judgment of the archbishop [*presumably Stephen Langton of Canterbury*] and such others as he wishes to convoke to act with him."<sup>25</sup>

This text was most probably added to the Articles once the barons established the likelihood of Alexander's support for their cause should it prevail.<sup>26</sup> But the Scottish king could not take the risk of openly seeking renunciation of his Norham obligation to pay homage for his kingdom, given the reprisals that John might be able to wreak should he best his baronial opponents and reassert his former authority and power. Nor probably did Alexander wish to be at Runnymede or, indeed, to go anywhere near King John in England because, whatever the Articles might say, in terms of Norham homage for the kingdom could be demanded anyway and only be refused at considerable risk.

In any event, the dilemma did not arise, because, whether or not fortuitously, Alexander had instead to deal with the very immediate problem presented by a renewed internal challenge to his kingship from the MacWilliams. This took him towards the northern reaches of his kingdom in June 1215. On the same day that the great charter was executed, however, Alexander was presented, possibly at

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<sup>22</sup> On Ros see Holt, *Northerners*, pp. 24-6; W. E. Rhodes, "Ros, Robert de (c.1182–1226/7)", revd Hugh M. Thomas, *ODNB* [<http://www.oxforddnb.com/view/article/24077>].

<sup>23</sup> Carpenter, *Magna Carta*, pp. 17-18; Holt, *Magna Carta*, pp. 216-18, 356-72.

<sup>24</sup> Cosmo Innes and Thomas Thomson (eds), *The Acts of the Parliament of Scotland* [henceforth *APS*], 12 vols (Edinburgh: Records Commission, 1844-75), I, p.111 (1291 list of documents and other items held in the Scottish royal treasury). For the production of *APS*, especially the first volume in 1844, see Richard A. Marsden, *Cosmo Innes and the Defence of Scotland's Past c.1825-1875* (Farnham: Ashgate, 2014), ch. 2.

<sup>25</sup> The Articles of the Barons are in the British Library (henceforth BL), Add MS 4838. For an image see the BL website: <https://www.bl.uk/collection-items/the-articles-of-the-barons>. Translation from the Magna Carta Project website: [http://magnacarta.cmp.uea.ac.uk/read/articles\\_of\\_barons/Article\\_46](http://magnacarta.cmp.uea.ac.uk/read/articles_of_barons/Article_46).

<sup>26</sup> Carpenter, *Magna Carta*, pp. 303, 318.

Kincardine in the Mearns, with the severed heads of his already defeated rivals.<sup>27</sup> Suddenly secure against internal threats and firmly settled on his throne at the age of almost 17, he could turn his youthful energies to realising as far as possible the other opportunities that suddenly seemed to be available.

Over the next two years that was exactly what Alexander did. Once civil war broke out in England following the papal nullification of Magna Carta, he was brought into the baronial opposition camp by much more explicit promises about his and his sisters' marital autonomy and a grant of the northern counties executed by Eustace de Vescy (now, with Robert de Ros as well, one of the twenty-five barons charged with the enforcement of Magna Carta<sup>28</sup>) handing over a staff in symbol of seisin during the besieging of Norham Castle in the autumn of 1215. The staff still survived in the Scottish treasury in 1291, alongside the written promises about the royal marriages.<sup>29</sup> Alexander moved on to devastate Newcastle in November before returning to Scotland for the winter.

In the meantime the baronial opposition had taken the drastic (and for their cause possibly fateful) step of offering the English crown to the Dauphin Louis, son and heir of Philip Augustus. Now under threat of deposition, John invaded south-east Scotland in the early months of 1216, wreaking revenge for the Scots' devastation of Newcastle; but he was forced to withdraw by a worsening position back in England. Alexander and his army moved on to the offensive in the north of England, and then in June received a summons to come into the faith of the Dauphin Louis, who had landed in Kent in May. The Scots undertook the long journey to meet Louis at Dover: 'the farthest south a Scottish king was ever to lead a hostile force into England.'<sup>30</sup>

At Dover Alexander gave homage to Louis but probably only for the lands he already held in England; and he did not receive any quitclaim in respect of his kingdom or the marriages of himself and his sisters. Disappointed in his largest ambitions, Alexander and his army set out back for Scotland in the autumn of 1216. Partly in an effort to intercept the withdrawing Scots, John and his following embarked upon what would prove to be the king's disastrous last journey from King's Lynn to Newark. Already suffering from dysentery, John lost a significant part of his baggage train while crossing the Wash, and finally succumbed to his sickness at Newark on the night of 18-19 October. The fast-moving Scots were never overhauled, and made it back to Scotland unscathed.

The death of John transformed England's internal political situation, however. The accession of the nine-year old Henry III, coupled with the November 1216 and November 1217 reissues under his authority of a Magna Carta "shorn of those clauses which in any way compromised the kingship of the under-age king", brought most of the baronial opposition back within the royal fold.<sup>31</sup> As Dan Jones has put it:

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<sup>27</sup> Oram, *Alexander II*, p. 250.

<sup>28</sup> Holt, *Magna Carta*, pp. 402-3.

<sup>29</sup> See APS, I, pp. 111-12.

<sup>30</sup> Oram, *Alexander II*, p. 42.

<sup>31</sup> On these reissues, see Holt, *Magna Carta*, pp. 314-20; Carpenter, *Magna Carta*, pp. 406-16. Quotation from Oram, *Alexander II*, p. 45.



“Magna Carta was no longer primarily a peace treaty imposed by the king’s enemies. It was an offering by the king’s friends, designed to demonstrate voluntarily the commitment of the new regime to govern by principles on which the whole realm could agree. Magna Carta had mutated from a text of compromise into an assurance of good faith.”<sup>32</sup>

Although Alexander was able to continue exercising sovereign lordship in Cumbria for some time (including the appointment of a bishop of Carlisle),<sup>33</sup> his overall position grew increasingly weak. The defeat of the Dauphin Louis at Lincoln in May 1217, and his return to France in September that year, put an end to any prospect of sustained or sustainable success for the king of Scots. The English royal government saw no need to risk dismemberment of the re-uniting English kingdom by including any equivalent to Chapter 59 of 1215 in the reissues of 1216 and 1217: as Carpenter remarks, “[d]oubtless [Alexander] was considered a hopeless case”.<sup>34</sup> It was also Alexander’s turn to be subjected to the Pope’s wrath on behalf of Henry III as papal vassal, with the Scottish kingdom being briefly subjected to an interdict and the king himself being excommunicated late in 1217 as penalties for his failure to submit. These were lifted, however, after Alexander had given homage to Henry III in a Christmastide ceremony at Northampton, albeit with reference only to the earldom of Huntingdon and the lordship of Tynedale.

The ceremony suggests that Alexander and Henry’s minority government were by now clearly thinking that peaceful negotiation and agreement while avoiding the truly contentious issues provided the most politic way forward after the chaos of the previous three years. So did the papacy, which restored the “special daughter” status of the Scottish church in a bull dated 21 November 1218.<sup>35</sup> In 1220 an agreement was made at York by which Alexander would marry Henry’s sister, Joan, and this was eventually carried out, also at York, on 19 June 1221. Thereafter Alexander’s sisters, who had lived in England since the Treaty of Norham in 1209, were at last married off as well.<sup>36</sup> Probably late in 1221, Margaret was wed, not to King Henry as envisaged in the Norham treaty, but to her custodian, Hubert de Burgh, the justiciar, later earl of Kent;<sup>37</sup> she survived until 1259, although widowed in 1243. Isabella remained in England (at Corfe) after her brother’s marriage, although not as a hostage in any sense, although she may have returned to Scotland for a time in 1222/23. But in 1225 she married the still minor Roger Bigod (who would

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<sup>32</sup> Jones, *Magna Carta*, p. 104.

<sup>33</sup> Keith J. Stringer, “Kingship, Conflict and State-Making in the Reign of Alexander II: the War of 1215-17 and its Context”, in Oram (ed.), *Reign of Alexander II*, p. 99, at pp. 132-8.

<sup>34</sup> Carpenter, *Magna Carta*, p. 409.

<sup>35</sup> Stones, *Anglo-Scottish Relations*, no. 5. See A. D. M. Barrell “Scotland and the Papacy in the Reign of Alexander II”, in Oram (ed.) *Reign of Alexander II* p. 157.

<sup>36</sup> Duncan, *Kingship of the Scots*, pp. 122-3; Oram, *Alexander II*, pp. 68-9, 111, 127. For a full account of the sisters see Katherine Weikert, “The Princesses Who Might Have Been Hostages: The Custody and Marriages of Margaret and Isabella of Scotland, 1209-1220s”, in Matthew Bennett and Katherine Weikert (eds.) *Medieval Hostageship c.700-c.1500: Hostage, Captive, Prisoner of War, Guarantee, Peacemaker* (New York: Routledge, 2016), p. 122. I am indebted to Dr Gwen Seabourne for this reference. A third sister of Alexander II (younger than him and confusingly also named Margaret) married an English noble (Gilbert Marshal) in 1235 (Oram, *Alexander II*, p. 117) but there is no evidence that she was ever held in England. The location of her marriage at Berwick suggests her Scottish domicile at that time.

<sup>37</sup> On Hubert see F. J. West, “Burgh, Hubert de, earl of Kent (c.1170–1243)”, *ODNB* [<http://www.oxforddnb.com/view/article/3991>].

become fourth earl of Norfolk). Isabella thereafter lived in England, not dying until the 1260s.<sup>38</sup>

The question of the northern counties was finally settled by the Treaty of York in September 1237, by which “Alexander king of Scots remitted and quitclaimed for himself and his heirs, to Henry, king of England, and his heirs, in perpetuity, the counties of Northumberland, Cumberland, and Westmorland”. In return Alexander received five manors in northern England and £60 worth of land in the manor of Penrith, while “the writings and documents concerning the marriages and agreements negotiated by John, formerly king of England, or by Henry, king of England, and by William, formerly king of Scots, or by Alexander, king of Scots”, i.e. in particular the treaties of 1209 and 1212, were to be mutually restored.<sup>39</sup> This process presumably led on to the destruction of these documents, explaining why no authentic copies have come down to us. The conclusion of the treaty, it may be noted, was preceded in January by Henry III’s confirmation of the Magna Carta of 1225, the reissue in question having been, like its predecessors, an act of his minority that accordingly could until then have been rescinded.<sup>40</sup>

In sum, the events leading up to and following Chapter 59 of the 1215 Magna Carta were indeed of crucial importance, not just for the king of Scots, but also for medieval Britain as a whole.<sup>41</sup> The territorial limits of England and Scotland were established almost as we still know them today.<sup>42</sup> The English attempt to confirm their king’s overlordship over Scotland did not succeed, although the question would bubble on for the rest of the thirteenth century before exploding once more in the 1290s.<sup>43</sup> Scottish kingship, the prestige and authority of which had seemed in decline in the last years of William the Lion, was reinvigorated by his son. The whole of Alexander’s 35-year reign was considered a success by contemporaries as well as by modern historians.<sup>44</sup> Following the Treaty of York, he was sufficiently independent of his English counterpart to be able, after the death of his first queen in 1238, to marry a French noblewoman (Marie de Coucy) without first gaining Henry’s

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<sup>38</sup> On Roger see Robert C. Stacey, “Bigod, Roger (III), fourth earl of Norfolk (c.1212–1270)”, *ODNB* [<http://www.oxforddnb.com/view/article/2380>].

<sup>39</sup> Stones, *Anglo-Scottish Relations*, no 7.

<sup>40</sup> Holt, *Magna Carta*, pp. 325-6.

<sup>41</sup> On Wales and Ireland see Carpenter, *Magna Carta*, pp. 235-7, 241-4, 304, 317, 352-3.

<sup>42</sup> After much to-ing and fro-ing in the fourteenth and fifteenth centuries, Berwick-upon-Tweed was finally and permanently taken under English control in 1482. See further Sir John Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge: Cambridge University Press, 2017), pp. 299-302 for a case in King’s Bench in 1600 in which it was held that Magna Carta and *habeas corpus* applied within the borough despite an English royal charter of 1356 by Edward III said to grant the town the right to be governed by the old laws used in the time of King Alexander [III] of Scotland and since time immemorial (*Brearley’s Case* (alias *Breerley*) (Hil. 1601) BL, MS Lansdowne 1088 ff. 52-4. For the 1356 charter see *Rotuli Scotiae in Turri Londonensi et in Domo Capitulari Westmonasteriensi Asservati Volume I* (London: Records Commission, 1814), pp. 791-2. Berwick was not fully subsumed into the English jurisdiction until the nineteenth century, and the legal position of the town, its liberties and inhabitants in the interim deserves further exploration.

<sup>43</sup> Duncan, *Kingship of the Scots*, chs 8-14.

<sup>44</sup> Norman H. Reid, “A great prince and very greedy of this world’s honour: the Historiography of Alexander II” in Oram (ed) *Reign of Alexander II*, p. 49, at pp. 49-61; Oram, *Alexander II*, pp. 1-3, 256-9. The MacWilliam threat was brought to a brutal conclusion in 1230, when the last survivor of the line, a girl just 2 years old, had her brains dashed out on the Forfar market cross: Oram, *Alexander II*, p. 96.

consent; yet also seemingly without any resulting perception of provocation.<sup>45</sup> Marie would give Alexander the son who, despite being not quite eight years old, became unquestioned king as Alexander III in 1249, reinforcing the security of his father's dynasty for at least as long as he lived. This continuity and internal strength of the Alexandrian regimes were crucial to the reality of the community of the realm of Scotland that would successfully face its most severe and prolonged test in the wars of independence following the sudden death of Alexander III in 1286.

### **Knowledge and influence of Magna Carta in medieval Scotland**

Knowledge of the events at Runnymede in June 1215 spread quickly beyond the Scottish king and his immediate advisers. The chronicler at the Cistercian abbey of Melrose in the Scottish Borders composed vigorous verse about it in making a chronicle entry for 1215, possibly quite soon after the event.<sup>46</sup> The extracts from his words that follow are in the somewhat free but stylish translation published by Joseph Stevenson in the 1850s:

“A new state of things began in England; such a strange affair as had never before been heard; for the body wished to rule the head, and the people desired to be masters over the king. The king, it is true, had perverted the excellent institutions of the realm, and had mismanaged its laws and customs, and misgoverned his subjects. His inclination became his law; he oppressed his own subjects; he placed over them foreign mercenary soldiers, and he put to death the lawful heirs, of whom he had possession as his hostages, while an alien seized their lands.”<sup>47</sup>

The Melrose chronicler clearly saw Magna Carta as against the natural order of things – the body ruling the head, something that had never been heard of before. But King John's prior conduct had also been fundamentally wrong in the chronicler's eyes: arbitrary, illegal and tyrannous mis-use of the instruments of rule was not the behaviour of a king. The chronicler went on to say, in effect, that John's evident unwillingness “to stand to the right” meant that his barons and knights had properly ‘tendered back to him the homage they had previously made’. But the barons and knights equally properly remained ‘unwilling to lay violent hands upon the king’. What instead “they earnestly desired” was that ‘the older laws of the realm should be restored to them’. In all this, the chronicler was reflecting contemporary ideas about good government and the proper relationship between king and people.<sup>48</sup> But the

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<sup>45</sup> Oram, *Alexander II*, pp. 156-7.

<sup>46</sup> *Chronicle of Melrose*: BL, MS Cotton Faustina B. IX, f. 31v (accessible on the DVD accompanying Dauvit Broun and Julian Harrison (eds.), *The Chronicle of Melrose Abbey: A Stratigraphic Edition Volume I: Introduction and Facsimile Edition*, (Edinburgh: Scottish History Society, 2007). See further Holt, *Magna Carta*, pp. 410-11. Two other editions of the Melrose Chronicle exist: Joseph Stevenson (ed.), *Chronica de Mailros* (Edinburgh: Bannatyne Club, 1835); A. O. Anderson, M. O. Anderson and W. C. Dickinson (eds), *Chronicle of Melrose* (London: Percy Lund Humphries & Co., Ltd., 1936).

<sup>47</sup> Joseph Stevenson (ed. and trans.), *The Church Historians of England Vol IV Part I* (London: Seeleys, 1856), p. 158, for this and all quotations in the following paragraph. The alien is the justiciar Peter des Roches bishop of Winchester, who came from the Touraine in north-west France: see further Nicholas Vincent, “Roches, Peter des (d. 1238)”, *ODNB* [<http://www.oxforddnb.com/view/article/22014>]. The foreign mercenaries were troops employed by King John (see Carpenter, *Magna Carta*, pp. 247-9).

<sup>48</sup> Carpenter, *Magna Carta*, pp. 251-73; R H Helmholz, “Magna Carta and the Law of Nations”, in Robin Griffith-Jones and Mark Hill Q.C. (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge: Cambridge University Press, 2015), pp. 70-80.

special interest of Magna Carta for the chronicler lay in the way that these ideas had been made concrete and real in an actual and fully articulated written arrangement. It was a dramatic case study in when and how to reform the ways of one seen by his people as a tyrant, so that he would henceforth behave rather as a king.

The transcription of the text of the Magna Carta of 1225 into the register of Glasgow cathedral around 1230, during the episcopate of Walter (formerly chaplain to King William), may have been informed by different, or at least additional interests on the part of the scribe who wrote it or the superior who ordered him to do so.<sup>49</sup> In the original register (but not the printed edition thereof) the transcript is preceded by a copy of the coronation charter of liberties issued by King Henry I of England in 1100 and then followed by a chronicle extract dealing with the Constitutions of Clarendon 1164 and the resistance to them of Thomas Becket.<sup>50</sup> None of the items appears to be in the same handwriting, but this need not mean that their transcriptions are entirely un-related. The particular interest may have been the freedom of the church with the royal guarantee of which both Magna Carta and the Coronation Charter open. Becket's refusal to knuckle under to King Henry II was the most famous example of the church's assertion of its liberties against royal authority, and his death inspired the dedication of King William's Tironensian abbey of Arbroath in 1178.<sup>51</sup> Was the interest in Glasgow in such matters entirely academic? There are certainly signs during the reign of Alexander II of concern on both sides of the line to define more sharply the respective spheres of ecclesiastical and secular jurisdiction.<sup>52</sup> But this could not be said to arise from any general struggle, jurisdictional or political, between church and king at the time.

Despite the preservation in Glasgow University Library of the other medieval manuscript of Magna Carta in Scotland today, it is certainly not a native product like the one in the Glasgow cathedral register. The attractively illuminated text, which appears to be based on the issue of 1217 rather than 1225, forms the first entry in what is an octavo English statute book the other contents of which do not seem to extend beyond 1300.<sup>53</sup> Whatever its date of compilation, it almost certainly arrived in

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<sup>49</sup> Cosmo Innes (ed.), *Registrum Episcopatus Glasguensis; Munimenta Ecclesie Metropolitane Glasguensis a Sede Restaurata Seculo Incunte Xii Ad Reformatam Religionem*, 2 vols, (Edinburgh: Bannatyne Club, 1843) II, no. 533 (the original is in Glasgow's *registrum vetus*, now held in Aberdeen University Library, Scottish Catholic Archive (henceforth AUL, SCA) JB 1/3, ff. 34v-37v). I am grateful to Dr Andrew Simpson for help in accessing the MSS. On Innes' editorial approach to the publication of the Glasgow registers, see Marsden, *Cosmo Innes*, pp. 143-4. On the 1225 reissue as the "final and definitive" version of the Charter's text, see Carpenter, *Magna Carta*, pp. 417-29; but note that as an act of Henry III's minority (he was still only 18 in 1225) it still required formal confirmation in the king's full age. This confirmation did not happen until January 1237: Holt, *Magna Carta*, pp. 325-6.

<sup>50</sup> *Registrum Episcopatus Glasguensis*, II, nos 531 (AUL, SCA JB1/3, ff. 28v-29r), 532 (AUL, SCA JB1/3, f. 41r).

<sup>51</sup> Richard Oram, *Domination and Lordship: Scotland 1070-1230* (Edinburgh: Edinburgh University Press, 2011), p. 139.

<sup>52</sup> Hector L. MacQueen, "Canon Law, Custom and Legislation: Law in the Reign of Alexander II", in Oram (ed), *Reign of Alexander II*, p. 221, especially at pp. 230-2, 236-8.

<sup>53</sup> Glasgow University Library, Special Collections, MS Gen 336 (Statutes of the Realm), dating it 1349x1399. The Magna Carta Project website dates it earlier and confidently identifies the text as that of 1217: see

[http://magnacarta.cmp.uea.ac.uk/read/magna\\_carta\\_copies/XV\\_\\_A\\_late\\_thirteenth\\_\\_early\\_fourteenth-century\\_statute\\_book\\_\\_Glasgow\\_University\\_Library\\_\\_MS\\_Gen\\_\\_336\\_\\_](http://magnacarta.cmp.uea.ac.uk/read/magna_carta_copies/XV__A_late_thirteenth__early_fourteenth-century_statute_book__Glasgow_University_Library__MS_Gen__336__). The MS has featured in a number of exhibitions on account of its illuminations. Some images are accessible via the Glasgow library's online catalogue ([http://special.lib.gla.ac.uk/manuscripts/search/detail\\_c.cfm?ID=8354](http://special.lib.gla.ac.uk/manuscripts/search/detail_c.cfm?ID=8354)).

Scotland in the second half of the eighteenth century, as it bears to have been presented to Glasgow University in 1786 by one Aeneas MacLeod of Cadboll.<sup>54</sup> Robert Bruce Aeneas MacLeod, to give the donor his full and patriotic name, was born in 1764. He matriculated in Glasgow University in 1780 and again in 1787, taking the class in Logic each time, but seems never to have graduated.<sup>55</sup> Said to have been a staunch Tory, he was admitted to the Scots bar in March 1789 and became MP for Cromartyshire (where his estate lay) from 1807 to 1812. Perhaps his *Statutes of the Realm* came from the 'huge library' of his Jacobite father at the family's Invergordon castle; if so, the gift saved the manuscript from the disastrous blaze which destroyed the library in 1805.<sup>56</sup>

Direct evidence of interest in Magna Carta in thirteenth-century Scotland is thus rather limited. But it probably did have at least some influence. Space does not permit a detailed comparison between the provisions of Magna Carta and the pre-1300 texts of Scots law; and in any event such a discussion should await the publication of Dr Alice Taylor's forthcoming critical edition of these texts.<sup>57</sup> We may simply note here repeated assertions of the freedom of the church and the principles of justice for all and trial by peers to be found in the relevant sources.<sup>58</sup> There is some other thirteenth-century evidence. In 1285, Robert Bruce earl of Carrick exempted the Carrick tenants of Melrose Abbey from the *superdictu* ('accusation') 'of our sergeants' because the tenants claimed *legem Anglicana*.<sup>59</sup> The sergeants were officers of the earl who had power to make accusations against alleged wrongdoers and also to receive material support (food and shelter) from those whom they protected by their activities.<sup>60</sup> The *lex Anglicanum* (i.e. English written law) claimed by the tenants, which may have been theirs by virtue of a prior grant, is likely to have been Chapter 38 of Magna Carta, which provided that no bailiff should put someone to his law by a simple complaint but should lead faithful witnesses to it, i.e. no-one

<sup>54</sup> For MacLeod see <http://www.historyofparliamentonline.org/volume/1790-1820/member/macleod-robert-bruce-aeneas-1764-1844>; F. J. Grant *The Faculty of Advocates 1532-1944* (Edinburgh: Scottish Record Society vol. 76, 1944) p. 140.

<sup>55</sup> W. Innes Addison (ed.), *The Matriculation Albums of the University of Glasgow 1728-1858* (Glasgow: Glasgow University Press, 1913), nos 4015, 4688. MacLeod's name is not to be found in W. Innes Addison (ed.), *A Roll of the Graduates of the University of Glasgow 1727-1897* (Glasgow: Glasgow University Press, 1898).

<sup>56</sup> See two articles available on the Internet: (1) the Invergordon community website (<http://www.invergordon.info/EarlyHistory>) and (2) a Wikipedia biography of Aeneas ([https://en.wikipedia.org/wiki/Robert\\_Bruce\\_Aeneas\\_Macleod](https://en.wikipedia.org/wiki/Robert_Bruce_Aeneas_Macleod)). I have not been able to verify all the information given on these sites.

<sup>57</sup> The edition will be published by the Stair Society. See meantime Taylor's relevant writings: "Leges Scocie and the Lawcodes of David I, William the Lion and Alexander II" (2009) 88 *Scottish Historical Review* (henceforth *SHR*) 207; "The Assizes of David, King of Scots, 1124-53" (2012) 91 *SHR* 197; *The Shape of the State in Medieval Scotland 1124-1290* (Oxford: Oxford University Press, 2016), especially ch. 3. Also important in any such study will be Keith Stringer's still forthcoming edition of the acts of Alexander II (vol. III in the *Regesta Regum Scottorum* series). On trial by peers in thirteenth-century Scotland, see Ian D. Willock *The Origins and Development of the Jury in Scotland* (Edinburgh: Stair Society vol. 23, 1966), pp. 29-30.

<sup>58</sup> See e.g. APS, I, pp. 318 (judgement by peers), 382-3, 467 (freedom of the church, no sale of justice).

<sup>59</sup> Cosmo Innes (ed.), *Liber de Sancte Marie de Melros*, 2 vols (Edinburgh: Bannatyne Club, 1837) I, no. 316.

<sup>60</sup> See further Hector L. MacQueen, "The Laws of Galloway: a Preliminary Survey", in Richard D. Oram and Geoffrey P. Stell (eds), *Galloway: Land and Lordship* (Edinburgh: Scottish Society for Northern Studies, 1991), p. 131.

should be put on trial by the unsupported allegations of an official. The purpose of the earl's grant may also have been to remove the burden of material support from the tenants under the abbey.<sup>61</sup>

Dr Taylor has kindly drawn my attention to a chapter in the version of the Scottish legal treatise *Regiam Majestatem* found in the late medieval Cromertie manuscript, a chapter of which the compiler annotated in its top margin as follows: '*Nota de Magna carta anglie c xii<sup>o</sup> Assise ultime presentacionis ecclesie semper capiuntur coram iusticiar' nostris de bancho. Super his que pertinent ad forum Ecclesiasticum quore (sic) librum qui intitulatur de di [sic] brevium c item breue de ultima presentatione.*'<sup>62</sup> The point seems to have been to draw a contrast; the chapter itself is headed '*De his que spectant ad forum ecclesiasticum*' and deals with the causes pertaining to ecclesiastical rather than secular jurisdiction, and the Scottish position is clearly not the same as the English.<sup>63</sup> The Cromertie manuscript appears to be a product of the Carthusian Priory in Perth (founded in the 1420s) and is unusual amongst medieval Scottish legal manuscripts in having marginal glosses referring not only to canon and civil law but also (twice) to the English treatise *Magna Hengham*.<sup>64</sup>

In some instances the absence of evidence about the influence of Magna Carta may be significant. I have suggested elsewhere that insofar as much of the development of writs of entry in English law can be attributed to the effects of Chapter 34 (prohibiting the issue of *precipe* writs to deprive lords of their courts), so the absence of such writs in Scotland (where instead the *briefe of right* had wide general application) can be attributed to the lack of anything like Chapter 34 in Scots law.<sup>65</sup> In 1905 George Neilson pointed out that although much of *Regiam Majestatem* was copied from the English *Glanvill* (itself compiled in Henry II's time, i.e. well before Magna Carta), the former work's proemium omitted *Glanvill*'s quotation of Ulpian's celebrated maxim, "What pleases the prince has the force of

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<sup>61</sup> I owe this point to Paul Brand, who first drew my attention to Chapter 38 back in 1987. I am also grateful to Gwilym Owen for telling me of a 1443 grant of land in Wales to be held by the beneficiary and the "firstborn and male heirs of his body lawfully begotten to be inherited [*future infinitive and gerundive in the original's Latin*] according to the tenure and law of England [*secundum tenuram et legem Anglicanum*]" (University of Bangor archives, Penryhn 27).

<sup>62</sup> The Cromertie MS is located in National Library of Scotland, Adv. MS 25.5.10. For the marginal annotation see f. 40r.

<sup>63</sup> Lord Cooper (ed.), *Regiam Majestatem and Quoniam Attachiamenta* (Edinburgh: Stair Society vol. 11, 1947), pp. 60-1. There is no satisfactory modern edition of *Regiam*.

<sup>64</sup> See the description in APS, I, pp. 183-5. T. David Fergus (ed.), *Quoniam Attachiamenta* (Edinburgh: Stair Society vol 44, 1996), p. 20, describes it as *sui generis* amongst Scottish medieval legal MSS. For the "immensely popular" *Magna Hengham* of the later thirteenth century see T. F. T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press, 1958), p. 77; Paul Brand, *The Making of the Common Law* (London: Hambledon Press, 1992), pp. 369-91.

<sup>65</sup> Hector L. MacQueen, *Common Law and Feudal Society* (Edinburgh: Edinburgh University Press, 1993; repr. 2016), pp. 190-6. See now also Holt, *Magna Carta*, pp. 4-7 (editors' introduction), 136-40; Carpenter, *Magna Carta*, pp. 217-18, 455; John Hudson, *The Oxford History of the Laws of England Volume II 871-1216* (Oxford: Oxford University Press, 2012), pp. 620-1. Paul Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England* (Cambridge: Cambridge University Press, 2003), pp. 153-4, questions the link between Chapter 34 and the development of the writs of entry. Taylor, *Shape of the State*, pp. 315-32 disagrees with my arguments about the *briefe of right* but makes no comment on the absence of writs of entry.

law”.<sup>66</sup> Neilson thought that *Regiam* was probably to be attributed to the first half of the thirteenth century,<sup>67</sup> which would have made the omission all the more significant. But current thinking is that *Regiam* belongs most probably to the reign of Robert I (1306-1329).<sup>68</sup> That of course does not render it any the less likely that the omission was indeed a deliberate decision of *Regiam*’s author. In the implication that the king underlies the law, this is consistent in at least some respects with the declaration by the community of the realm of Scotland to the Pope, executed at Arbroath on 6 April 1320, that Robert had been made king by “the succession to his right according to our laws and customs which we shall maintain to the death, and the due consent and assent of us all”.<sup>69</sup>

Reference to the Declaration of Arbroath inevitably raises questions as to why there was never any Scottish equivalent to Magna Carta. The Declaration itself is clearly not such an equivalent. King Robert was not a party to the document, which was not a charter, and granted no liberties to the king’s people. It was rather an assertion by the community of the realm of Scottish sovereignty and independence from England, or the liberty of the nation, the maintenance of which was the king’s most fundamental duty. The Declaration’s most famous passage makes this clear:

“Yet if he [*Robert*] should give up what he has begun, seeking to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own right and ours, and make some other man who was well able to defend us our King; for, as long as a hundred of us remain alive, never will we on any conditions be subjected to the lordship of the English. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom alone, which no honest man gives up but with life itself.”<sup>70</sup>

A final point is that, unlike Magna Carta, the Declaration did not achieve any subsequent fame or influence outside Scotland, and even there, as Roger Mason has pungently expressed it, “virtually no one actually referred to it” until late in the seventeenth century.<sup>71</sup>

The absence of a Magna Carta equivalent can perhaps be explained by the fact that, compared to England, Scotland was a lightly governed country whose kings did not habitually engage in expensive overseas wars or crusades and in which the

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<sup>66</sup> George Neilson, “Magna Carta Revisited”, (1905) 17 *Juridical Review* (henceforth *JR*) 128, at 129. See G. D. G. Hall (ed.) *Glanvill* (London: Nelson, 1965), p. 2; Cooper (ed.), *Regiam Majestatem*, p. 57. For the maxim see Digest of Justinian, 1.4.1; Justinian, *Institutes*, 1.2.6.

<sup>67</sup> George Neilson, *Trial by Combat* (Glasgow: William Hodge & Co., 1890), p. 104.

<sup>68</sup> MacQueen, *Common Law*, pp. 90-1; Taylor, *Shape of the State*, p. 124.

<sup>69</sup> See Geoffrey Barrow (ed.), *The Declaration of Arbroath: History, Significance, Setting* (Edinburgh: Society of Antiquaries of Scotland, 2003); Edward J. Cowan ‘*For Freedom Alone*’: *The Declaration of Arbroath, 1320* (East Linton: Tuckwell Press, 2003). Both these works include translated texts of the Declaration.

<sup>70</sup> This famous flourish was shown to have been derived from the classical author Sallust (86-c35 BCE) in the mid-1940s: for the discussion since see Cowan, ‘*For Freedom Alone*’, pp. 57-60.

<sup>71</sup> Roger A. Mason, “Beyond the Declaration of Arbroath: Kingship, Counsel and Consent in Late Medieval and Early Modern Scotland”, in Steve Boardman and Julian Goodare (eds), *Kings, Lords and Men in Scotland and Britain 1300-1625: Essays in Honour of Jenny Wormald* (Edinburgh: Edinburgh University Press, 2014), p. 265 at pp. 267-8.

administration of justice was highly localised.<sup>72</sup> The barons and other landholders enjoyed considerable jurisdictional and other powers, and royal officers such as the sheriff and the justiciar were drawn from their ranks. They participated in the king's own government but quite frequently throughout the middle ages had to assume collective responsibility for that government when the king was a minor, held captive in England, or otherwise absent or incapacitated. This was the case for around 170 of the 425 years between the death of David I in 1153 and the 1578 majority of James VI.<sup>73</sup> In that whole period, only William the Lion and the three Roberts became king while not in minority; but Robert II (r. 1371-1390) was incapacitated and subject to a lieutenancy from 1384 while Robert III (r. 1390-1406) was similarly placed from accession to 1393, and then again from 1399 until his death. As a result of all these difficulties, the landholding classes had plenty of involvement at the head of government and while they were never a monolithic unit politically, equally governments in which they were involved were never very likely to create unbearable fiscal and other burdens for themselves.<sup>74</sup>

Wendy Stevenson has however put forward a persuasive case that, starting with the Anglo-Scottish Treaty of Birgham-Northampton in 1290, whenever the Scots saw that there might be a chance of English forms of government entering Scotland covertly as a result of marriage and other alliances with the king of England, they took great pains to procure from him what were in effect charters of liberties.<sup>75</sup> The 1290 Treaty took the form of a grant by Edward I of England, addressed, however, not to all the free men of the kingdom of Scotland, but simply "to all who shall see or hear this letter". It provided generally for the inviolability of the laws, liberties and customs of the Scots. But there were also specific clauses on financial demands, castle-building on the border, and appeals outside the kingdom in law cases, and it is these, Stevenson argues, that give the Treaty the character of a charter of liberties. The Scots were seeking to prevent imposition of aspects of Plantagenet rule which burdened English subjects much more severely than the kings of Scots had ever

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<sup>72</sup> See Taylor, *Shape of the State*, especially chs 2, 6 and 7; note also David Carpenter, "Scottish Royal Government in the Thirteenth Century from an English Perspective" in Matthew Hammond (ed.) *New Perspectives on Medieval Scotland 1093-1286* (Woodbridge: The Boydell Press, 2013) pp. 117-59. Note too MacQueen, *Common Law and Feudal Society*, pp. 35 ("[I]t is apparent that the twelfth century witnessed the beginnings of an intensification of royal government ... However, this should also be seen as a gradual process operating for a long time beside and with the older forms of the king's authority"); and 66 ("[T]he essence of the Scottish court system throughout the medieval period was a partnership, or a multitude of partnerships, between the centre and the localities"). Note also that a relatively small number of individual Scots landholders did go on crusade (see Alan Macquarrie, *Scotland and the Crusades 1095-1560* (Edinburgh: John Donald, 1984, repr. 1997); David Ditchburn, *Scotland and Europe: The Medieval Kingdom and its Contacts with Christendom, 1214-1560* (East Linton: Tuckwell Press, 2001) pp. 65-73), or take their followings off to other countries to fight as mercenaries (Brian G. H. Ditcham, "The Employment of Foreign Mercenary Troops in the French Royal Armies, 1415-1470", University of Edinburgh PhD thesis, 1978).

<sup>73</sup> This is my rough approximation, working from the data contained in Peter G. B. McNeill, "The Scottish Regency" (1967) 12 *JR* 127-48, and Amy Blakeway, *Regency in Sixteenth-Century Scotland* (Woodbridge: The Boydell Press, 2015), then adding in the minority years of Malcolm IV (1153-59), Alexander II (1214-19) and Alexander III (1249-60).

<sup>74</sup> But note Ranald Nicholson, "Feudal Developments in Late Medieval Scotland", (1973) 18 *JR* 1; Craig Madden, "Royal Treatment of Feudal Casualties in Late Medieval Scotland", (1976) 55 *SHR* 172.

<sup>75</sup> Wendy B. Stevenson "The Treaty of Northampton (1290): a Scottish Charter of Liberties?", (2007) 86 *SHR* 1. A full translation of the Treaty is in G. W. S. Barrow, "A Kingdom in Crisis: Scotland and the Maid of Norway", (1990) 69 *SHR* 137-41.



sought to do in Scotland, fears having been sparked by what happened in Wales after the Edwardian conquest there in 1277-1283.

While the main focus of Stevenson's analysis is on 1290, she touches on further examples through to the Treaty of Greenwich in 1543. This is the point in time at which J. D. Ford begins his study of Anglo-Scottish agreements looking towards possible union of the two kingdoms up to and including the Union Agreement finally achieved and implemented in 1707.<sup>76</sup> He shows "an impressive consistency" in the Scottish insistence that their laws and liberties should be preserved within any union. Whether or not English people believed their liberties were protected by Magna Carta (and their common law), the perception of England north of the border was one of royal oppression, arbitrary rule, and heavy fiscal burdens.<sup>77</sup> Even when the traditional Scottish negotiating stance was abandoned in 1707 and it was conceded in Article XVIII that the laws on "public right, policy and civil government" *might* be made the same in Scotland as in England, the agreement provided that laws on "private right" were *not* to be altered, except for "the evident utility of the subjects within Scotland". "Evident utility" was thought to be a high hurdle for Parliament to cross; but it was not fenced around with any machinery by which any new law might be tested or struck down for non-compliance.<sup>78</sup>

### Scots Law, Magna Carta and Mussels

The Scots lawyers of the early modern period showed little if any interest in Magna Carta. The only one to mention it is Thomas Craig (c.1538-1608) who in his *Jus Feudale*, composed in the shadow of the union of the Crowns in 1603, observed that:

"Laws in both [England and Normandy] are designated *cartae* ("charters"), as in the English *Magna Carta* (Great Charter). In Normandy, the charter of *Ludovici Huteni* and the charter of King Philip were enforced as laws enacted by those princes."<sup>79</sup>

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<sup>76</sup> J. D. Ford, "The Legal Provisions in the Acts of Union" [2007] *Cambridge LJ* 106; J. D. Ford, "Four Models of Union" [2011] *JR* 45, reproduced with appendices in Hector L. MacQueen (ed.) *Miscellany VII* (Edinburgh: Stair Society vol. 62, 2015), pp. 179-215.

<sup>77</sup> For a robust assertion of the common law's favour for individual liberty in the early modern period, see Sir John Baker Q.C., "Magna Carta and Personal Liberty", in Griffith-Jones and Hill Q.C. (eds), *Magna Carta, Religion and the Rule of Law*, pp. 81-108.

<sup>78</sup> On contemporary understandings of "evident utility" see John W. Cairns, "The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair" (2007) 11 *Edinburgh LR* 300 at 315-6; Ford, "Legal Provisions", 117.

<sup>79</sup> Thomas Craig, *Jus Feudale* (first published London: Company of Stationers, 1655; subsequent editions published in 1716 (Leipzig: Gleditsch and Son) and 1732 (Edinburgh: Thomas and Walter Ruddiman)), I.vii.10. See also, for a similar remark by Craig, C. S. Terry (ed.), *De Unione Regnorum Britanniae Tractatus by Sir Thomas Craig* (Edinburgh: Scottish History Society, 1909), p. 89 (translation at p. 327). I am grateful to Dr Leslie Dodd for allowing me to use here his forthcoming translation of *Jus Feudale*, to be published by the Stair Society. The two French kings referred to are Louis X (*le Hutin*, the Quarreler, the Headstrong, or the Stubborn, r. 1314-1316) and his brother Philip VI (r. 1328-1350, known as *le Fortuné*, the Fortunate). Louis granted the *Charte aux Normands* in 1315 and Philip reconfirmed it in 1339. For context and discussion see Guy Bois, *The Crisis of Feudalism: Economy and Society in Eastern Normandy c.1300-1500* (Cambridge: Cambridge University Press, 1984) pp. 279-84, 292; Philippe Contamine "The Norman 'Nation' and the French 'Nation' in the Fourteenth and Fifteenth Centuries", in David Bates and Anne Curry (eds) *England and Normandy in the Middle Ages* (London: Bloomsbury Publishing, 1994), p. 215, especially at pp. 224-7.

The context is a discussion of the rise of parliaments as the essential law-making bodies alongside the king; Craig makes no suggestion that anything was written law in Scotland that had not been passed by the three estates of the realm with royal assent.<sup>80</sup> In his magisterial *Institutions of the Law of Scotland* James Dalrymple, Viscount Stair (1619-1695) affirmed that liberty is “the most native and delightful right of man, without which he is capable of no other right”, drawing from this that slavery and constraint without a lawful basis were wrongs.<sup>81</sup> But he made no reference at all to Magna Carta.

Even after the Anglo-Scottish Union of 1707, there is little if any sign of Scots lawyers referring to Magna Carta; and certainly not as part of Scots law in any way. Passing mention or reference, perhaps by way of analogy, can occasionally be detected.<sup>82</sup> Only one serious attempt was made to argue that Magna Carta had become part of the law of Scotland as a result of the 1707 Union. The argument was first put to Lord Kincairney in the Outer House of the Court of Session as late as 1901, in the mussel fishings case of *Parker v Lord Advocate*.<sup>83</sup> The issue was whether members of the public were entitled to take mussels from mussel scalps on the foreshore and in the bed of the estuary of the River Clyde free of any claim from the Crown or the tenant (the Fishery Board for Scotland) to whom the Crown had leased the scalps for 31 years in 1897, or the Board’s sub-tenant (one John Hamilton Fullarton). The first pursuer Parker was a mussel merchant in Greenock on the estuary’s southern bank, and the two other pursuers (Campbell and Bonnar) were mussel fishermen working out of Port Glasgow (also on the south side of the estuary). It appeared that all three had been conducting their operations without any particular hindrance from the Crown before the 1897 leases. The pursuers’ arguments to be allowed to continue their activities were put forward by Thomas Shaw KC, Charles Guthrie KC and Hugh Pattison Macmillan advocate, a team of formidable legal abilities. Shaw and Macmillan would later become Lords of Appeal

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For Craig’s writings as a conduit for knowledge of Magna Carta in seventeenth- and eighteenth-century Germany, see Carsten Fischer, “The Reception of Magna Carta in Early Modern Germany, c.1650-1800”, (2016) 37 *J of Legal History* 249, at 254, 256-7.

<sup>80</sup> Craig, *Jus Feudale*, I.viii.9.

<sup>81</sup> James Dalrymple, Viscount Stair, *Institutions of the Law of Scotland*, ed. D. M. Walker (Edinburgh: Edinburgh University Press, 1981), I.ii. The first edition of the *Institutions* appeared in 1681, the second in 1693.

<sup>82</sup> See David Hume *Commentaries respecting Crimes* 1<sup>st</sup> edn, 2 vols, (Edinburgh: Bell & Bradfute, 1800) I, p.133; 2<sup>nd</sup> edn (Edinburgh: : Bell & Bradfute, 1819) II, p. 82; 3<sup>rd</sup> edn (Edinburgh: Bell & Bradfute, 1829) II, p. 84; 4<sup>th</sup> edn, ed. Benjamin R. Bell (Edinburgh: Bell & Bradfute, 1844), II, p. 84 (referring to a 1701 Act of the Scottish Parliament that was roughly equivalent to the English Habeas Corpus Act 1679 as “that great charter of the personal liberty of the subject”); and *Kinnoull v Presbytery of Auchterarder* (1838) 16 S 661, 765 (Lord Corehouse), 787, 790 (both Lord Moncreiff), one of the cases leading ultimately to the “Disruption” of the Church of Scotland in 1843, in which different pre-Union statutes on the position of the Church following the Protestant Reformation of 1560 were variously referred to as “the great Charter of Presbytery”, “the Charter of the Church of Scotland”, and “the true Charter of the liberties of the Church of Scotland”. Lord Moncreiff was in the dissenting minority in the case, while Lord Corehouse was with the majority subject to some reservations. See further Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (Edinburgh: Edinburgh University Press, 2008), pp.11-20.

<sup>83</sup> *Parker v Lord Advocate* (1902) 4 F. 69; (1901) 9 S.L.T. 306.

in Ordinary, and Guthrie a Senator of the College of Justice.<sup>84</sup> But the *Parker* case was not to be one of their forensic triumphs.

The general legal context, which still applies today, is that of Crown rights in land subject to Scots law. These extend in particular to the sea and seabed within territorial waters, the foreshore, and rivers that are both navigable and tidal (as with the Clyde estuary in the *Parker* case), including the *solum* or bed of such rivers. The Crown's rights are usually said to be of two kinds: *regalia majora* and *regalia minora*. The *regalia majora* form part of the Crown's prerogative powers, or "right of sovereignty as guardian of the public interests for navigation, fishing and other public uses which cannot be alienated."<sup>85</sup> The Crown's exercise of its prerogative cannot affect the public rights in the property in question. So the sea below the foreshore and within the territorial limits is generally *inter regalia majora*. The foreshore has something of *regalia majora* about it, in that the public (rather than the Crown) has various inalienable rights over it, including navigation, anchorage, loading and discharging goods, embarkation and disembarkation, taking in ballast, and recreation. But the foreshore itself can be alienated by the Crown, albeit without prejudice to the public rights. The public has the right of white fishing (which includes taking shellfish, but not salmon fishing, which is amongst the *regalia minora*). The public right can be exercised on the foreshore, or in the sea or rivers (whether tidal or navigable). But the Crown's exercise of the *regalia minora* (which include, for example, salmon fishing) can have the effect of transferring its rights altogether and/or excluding any right for the public (as has commonly happened with rights of salmon fishing).<sup>86</sup>

The question to be resolved in *Parker* was the place of mussels and mussel scalps in this complex structure of interlocking Crown and public rights. In England the public had (and has) an undoubted right to fish for mussels in the tidal reaches of all rivers and estuaries, in the sea within British fishery limits, and from the foreshore, unless a property right has been acquired by the Crown or by grant to some other corporation or individual made before Magna Carta, or where the public right has been removed in some way by later legislation. There are also private (or several) fisheries where the right to fish is founded upon ownership of the underlying soil.<sup>87</sup> Various provisions of Magna Carta against obligations to build river-bridges and ordering removal of enclosures placed were thought to challenge royal controls of fishing.<sup>88</sup> Further, Chapter 33 of the 1215 Magna Carta, which reads as follows (in translation), "All kiddles [*kidelli*, i.e. fish weirs] shall be removed from the Thames,

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<sup>84</sup> See for bare outlines of their careers the respective entries in Stephen P. Walker, *The Faculty of Advocates 1800-1986: A Biographical Directory of Members Admitted From 1 January 1800 to 31 December 1986* (Edinburgh: privately printed, 1987).

<sup>85</sup> *Smith v Lerwick Harbour Commissioners* (1903) 5 F. 680, 691; (1903) 10 S.L.T. 742, 748 (per Lord Kinneir).

<sup>86</sup> For a summary, orthodox overview of the law see Lord Eassie and Hector L. MacQueen (eds), *Gloag & Henderson The Law of Scotland*, 13<sup>th</sup> edn (Edinburgh: W. Green, 2012), paras 34.03-34.10. For interesting discussions of how the concept of the *regalia* superseded earlier approaches based on Roman law and the "distinction of things", especially that between *res communes* and *res publicae*, see Niall Whitty, "Water Law Regimes", in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland*, 2 vols (Oxford: Oxford University Press, 2000), I, p. 420, at pp. 426-50; Jill Robbie, *Private Water Rights* (Edinburgh: Avizandum, 2015) ch. 2.

<sup>87</sup> *Halsbury's Laws of England* 5<sup>th</sup> edn, vol 51 (London: LexisNexis, 2013) paras 319, 378, 381, 384.

<sup>88</sup> See Chapters 23 and 47 of the 1215 Magna Carta.

the Medway, and throughout the whole of England, except on the sea coast”,<sup>89</sup> was taken to be aimed at the prevention of royal or any other monopolies over fishings in tidal waters. That understanding had been re-affirmed in the House of Lords at least twice during the nineteenth century, in *Malcolmson v O’Dea* in 1862 and in the Irish appeal of *Neill v Duke of Devonshire* in 1886.<sup>90</sup>

The argument bringing Magna Carta into the *Parker* case in Scotland must have sprung from a comparison with English law. But formally the argument probably began with the terms of the 1707 Union, Articles I and II of which had replaced the hitherto separate Crowns and kingdoms of England and Scotland with a single Crown and a united kingdom of Great Britain. According to the summary reports of the pursuers’ argument, however, specific reference to the articles was confined to Articles IV and XVIII. The former provides for freedom of trade and navigation in the new kingdom, and the communication of all rights, privileges and advantages to the subjects of either of the former kingdoms unless expressly agreed otherwise in the articles. Article XVIII is still well-known, at least amongst Scots lawyers, as it deals with the effect of the Union upon the laws of Scotland. Reference has already been made to its most famous provisions, which purported to govern the power of the new single Parliament created by Article III to change Scots law.<sup>91</sup> More important for the *Parker* case, however, was the preceding passage declaring that while from the Union the laws on regulation of trade, customs and excise were to be the same in Scotland as in England, otherwise they were to remain distinct from each other, with the exception of those “contrary to, or inconsistent with this Treaty”.

The arguments of pursuers’ counsel on this point in *Parker* are summarised thus in the printed report:

“In England the prerogative of the Crown, so far as regards the granting of several [*i.e. private*] fisheries, was limited by Magna Charta, and no grant could be made subsequent thereto (*Malcolmson v O’Dea*, 1862, 10 H.L. 593), and since the Union the exercise of the prerogative was subject to the same limitations in Scotland as in England ... Accordingly, no grant of mussel fishings in Scotland could now be competently given by the Crown to a subject.”<sup>92</sup>

The argument thus seems to have been that the Crown prerogative in a united kingdom could not differ within the kingdom; that in the matter of mussel-fishing Scots should enjoy the same privileges as the English; and that any law to the contrary had fallen in 1707. As reported, the defender’s reply was simply that “the question was purely one of Scots law, and English cases had no application”. Grants of mussel fishings did not proceed from the prerogative, but from the Crown’s patrimonial rights of property.

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<sup>89</sup> Chapter 23 in the 1225 version.

<sup>90</sup> See *Malcolmson v O’Dea* (1862) 10 H.L.C. 593; *Neill v Duke of Devonshire* (1882) 8 App. Cas. 135 at 179-80.

<sup>91</sup> See above, 000.

<sup>92</sup> *Parker v Lord Advocate* (1902) 4 F. 698, 704.

Lord Kincairney upheld the defender's line of argument, although confessing that he was not sure he had "fully appreciated" the pursuers' contrary position:

"It was to the effect, if I understood it rightly, that it followed from the provisions of Magna Charta that a several right of fishery in the sea could not be created in England after a very early date, I think the reign of Henry II; and that it followed from Articles 4 and 11 [*sic*] of the Treaty of Union that these provisions of Magna Charta applied, after the Union, to Scotland, and the conclusion seemed to be that there could be no valid grant of fishings in the sea which was dated later than the Union. I may have misunderstood this argument, which has the merit of ingenuity and originality ... I am not fully informed about the law of England on this matter, but I am satisfied that it is not imported into Scotland by the Treaty of Union, and that questions as to the law of mussel-fishings, like questions as to salmon-fishings, depend solely on the law of Scotland, and have always been so treated in the Courts of Scotland, and in the House of Lords. I am therefore of opinion that a Crown grant of mussel-fishings is, or may be, effectual to give an exclusive right to the grantee which will enable him to exclude the public."<sup>93</sup>

The judge could support his view by reference to relatively recent previous cases in which the Scottish courts had upheld Crown grants of mussel-fishings with no suggestion that the Crown authority to make them was in any way restricted.<sup>94</sup> The fact that the grants in question in these previous cases ante-dated the 1707 Union was nothing to the point, especially when more recent sea fisheries legislation appeared to recognise the rights claimed by the Crown rather than to assert them as of new. The treatment of mussels as distinct from white fishing was paralleled by the position of oysters to which likewise the public had no general entitlement.

Lord Kincairney's decision was upheld by the First Division of the Court of Session and then, on appeal again, by the House of Lords.<sup>95</sup> The House approved what had been said in the Court of Session, in particular the theory upholding the Crown's exclusive right on the basis that mussel scalps (like oyster beds) are clearly *partes soli*, that is, part of the ground on which they lie, and that that ground, viz the foreshore and the bed of the tidal navigable river and the sea within territorial waters, clearly was owned by the Crown. The permanent attachment of living mussels (and oysters) to the ground in question made them different from freely swimming fish. Lord Kincairney thought that an alternative theory put forward by John Rankine, Professor of Scots Law at Edinburgh University from 1888 to 1922, viz the greater value and adaptability of mussels and oysters as human food by comparison with other shellfish, the use of which was mainly limited to bait, was not necessarily in conflict with the *pars soli* theory.<sup>96</sup>

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<sup>93</sup> (1902) 4 F. 698, 703. The reference here to art. 11 (rather than art. 18) of the Union must be a slip by either Lord Kincairney, the reporter, the printer, or some combination of them. Article 11 deals with the non-liability of Scotland to window and lights taxes existing in England in 1707 but scheduled to lapse in 1710. It clearly has no bearing whatever on questions of the Crown prerogative or fishings.

<sup>94</sup> i.e. *Lindsay v Robertson* (1867) 5 M. 864; (1868) 6 M. 889; (1868) 7 M. 239; *Duchess of Sutherland v Watson* (1868) 6 M. 199.

<sup>95</sup> *Parker v Lord Advocate* (1902) 4 F. 698; (1902) 9 S.L.T. 499; (1904) 6 F. (H.L.) 37; [1904] A.C. 364.

<sup>96</sup> For further discussion of the reasoning supporting the distinctive legal treatment of mussels see K. G. C. Reid, *The Law of Property in Scotland* (Edinburgh: Butterworths, 1996), paras 331-3.

No-one involved in *Parker* seems to have been aware that the established legal understanding of Magna Carta and its impact upon fishing rights was just about to be challenged as a matter of its historical accuracy in a book entitled *The History and Law of Fisheries* written by Stuart A. Moore and H. Stuart Moore and published in 1902.<sup>97</sup> They showed that the chapters about bridges and riverbank enclosures were aimed at controlling the king's hunting rather than his fishing rights.<sup>98</sup> They also demonstrated that subjects as well as kings made grants of fishings that excluded public rights therein and that in the king's case this flowed from property rather than prerogative. In 1905 William S. McKechnie (1865-1930) drew on the Moores' work to argue in the first edition of his detailed commentary on Magna Carta that the aim of Chapter 33 was not to prevent fishing monopolies but to protect free navigation.<sup>99</sup> This view, which makes rather better sense of the chapter's actual wording, seems now to have established itself amongst lawyers and historians.<sup>100</sup>

A final twist in the legal history of the public right to collect mussels may yet be provided if the Scottish Law Commission's proposals for reform of the law, published in 2003, should ever be enacted.<sup>101</sup> Amongst the Commission's recommendations is that the public right to gather shellfish on the seabed should extend to mussels (and native oysters) unless there has been an exclusive grant of the right to gather such shellfish.<sup>102</sup> The other point of interest, more directly linked to the discussion of Magna Carta and its effect on Crown rights, is the view the Commission took on whether the topic was within the legislative competence of the devolved Scottish Parliament created by the Scotland Act 1998. The Commission noted that while the Crown's constitutional position and the management of the Crown Estate were not devolved, there was and is no reservation of the Crown's prerogative functions or of the property belonging to the Crown. The Commission concluded:

"The Crown's interest as proprietor of the foreshore and sea bed and the public rights held by the Crown in trust for the public are therefore not reserved."<sup>103</sup>

Implementation of the Commission's proposals was amongst the Scottish Green Party's manifesto commitments in the Scottish Parliamentary election of 2016. Since the Greens can hold the balance of power in the Scottish Parliament 2016-2021, the minority SNP government may be persuadable to support this aspect of

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<sup>97</sup> Stuart A. Moore and H. Stuart Moore, *The History and Law of Fisheries* (London: Stevens and Haynes, 1902), ch. II.

<sup>98</sup> See further Carpenter, *Magna Carta*, pp. 205-6.

<sup>99</sup> W. S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (Glasgow: James Maclehose & Sons, 1905), pp. 402-5; 2<sup>nd</sup> edn (Glasgow: James Maclehose & Sons, 1914), pp. 343-6.

<sup>100</sup> Holt, *Magna Carta*, p. 33; Carpenter, *Magna Carta*, pp. 29, 119; Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Oxford: Hart Publishing, 2014), p. 87; Lord Neuberger, "Magna Carta: the Bible of the English Constitution or a Disgrace to the English Nation?", para. 32.

<sup>101</sup> Report on the Law of the Foreshore and Sea Bed (Scot Law Com No 190, 2003). See also the preceding Discussion Paper No 113 (2001).

<sup>102</sup> Report on the Law of the Foreshore and Sea Bed, recommendation 9; and see accompanying discussion at paras 3.14 and 3.19.

<sup>103</sup> Report on the Law of the Foreshore and Sea Bed, para 1.14.

their manifesto, especially as it is not inconsistent with the government's own land reform agenda.<sup>104</sup> Management of the Crown Estate in Scotland was devolved on 1 April 2017 under the Scotland Act 2016, and a prospective Scottish Parliamentary Bill on the subject may provide a legislative opportunity to provide the public with a right to gather mussels and oysters from the seabed.<sup>105</sup>

### **Glasgow's Conveyancing Professor and Magna Carta**

We may now return briefly to McKechnie's book on Magna Carta, which is worthy of note in its own right in an article on Scottish aspects of Magna Carta and its history. The work appeared in a second edition in 1914, no doubt anticipating the seven hundredth anniversary of Runnymede the following year. The commentary is bracketed with Blackstone's by the late Sir James Holt.<sup>106</sup> Holt elsewhere pointed out what he saw as the limitations of McKechnie's work:

“[I]t embodied the approach of the lawyer concerned with pursuing the provisions of the Charter through subsequent legal developments. The result was a learned work of scholarship, but it was not always closely related to the circumstances in which the Charter was produced.”<sup>107</sup>

This may however be contrasted with the view of Sir Herbert Butterfield, scourge of the Whig interpretation of history, that “McKechnie had overthrown the myth of Magna Carta”.<sup>108</sup> McKechnie was a Scots rather than an English lawyer, who, moreover, ended up as Professor of Conveyancing at Glasgow University from 1916 and had had experience of conveyancing practice as a partner in a firm of Glasgow solicitors (McKechnie and Gray) between 1890 and 1915.<sup>109</sup> If that makes him at first blush an unlikely commentator on an English medieval constitutional document, the text of the commentary and its introduction makes clear amongst other things the value of his technical understanding of how formal documents are put together and executed as well as his knowledge of the original manuscript sources for Magna Carta.

But actually McKechnie was not even primarily a conveyancer. His interest in Magna Carta began as Lecturer in Constitutional Law and History at Glasgow

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<sup>104</sup> For the Greens manifesto see <https://www.greens.scot/scotland-can>. The commitment is made in the Land Reform section of the manifesto. For the SNP agenda following the passage of the Land Reform (Scotland) Act 2016 during the 2011-2016 Scottish Parliamentary session, see its manifesto (accessible at <http://www.snp.org/manifesto>) in the section headed ‘A Sustainable Scotland’.

<sup>105</sup> See Scotland Act 2016 s. 36, adding s.90B to the Scotland Act 1998. A consultation on the prospective legislation ran from 4 January to 29 March 2017: see <https://consult.scotland.gov.uk/crown-estate-strategy-unit/long-term-management-of-the-crown-estate/>.

<sup>106</sup> Holt, *Magna Carta*, p. 34.

<sup>107</sup> Holt, *Magna Carta*, p. xvi. For a more appreciative judgement (“Good sense is [the work’s] prime quality”), see D. J. Medley, ‘McKechnie, William Sharp (1863–1930)’, revised J. C. Holt, *ODNB* (2004) [<http://www.oxforddnb.com/view/article/34743>].

<sup>108</sup> Sir Herbert Butterfield, *Magna Carta in the Historiography of the Sixteenth and Seventeenth Centuries*, The Stenton Lecture 1968 (Reading: University of Reading, 1969), p. 25. See also H. Butterfield, *The Whig Interpretation of History* (London: G. Bell and Sons, 1931), p. 10.

<sup>109</sup> Further on McKechnie's appointment to the Conveyancing chair, see R. G. Anderson, “Assignment of All Sums Securities”, in F. McCarthy, J. Chalmers and S. Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Cambridge: Open Book Publishing, 2015), p. 73, at pp. 78-81.

University, a post which he held alongside his law firm partnership from 1894, and in which he published a number of other works of political science rather than history or law.<sup>110</sup> McKechnie was most engaged intellectually by constitutional theory and constitutional reform. He wrote about the role of the state, seeking a middle line between socialism and individualism; and he was concerned that the expansion of democracy had rendered obsolete the traditional checks and balances of what he usually called the English constitution.<sup>111</sup> Insights drawn from these wider, more contemporary interests may have led, as noted by the late Professor Walker, to departure from the traditional lawyers' view of Magna Carta as an early charter of rights, to present it instead as "an agreement between a king and his rebellious barons containing concessions by both sides and with many provisions designed only to deal with current problems".<sup>112</sup> The renewed discussion of the Charter in the course of its 800th anniversary commemorations surely also confirmed the enduring truth of this observation made by McKechnie: "The greatness of Magna Carta lies not so much in what it was to its framers in 1215, as in what it afterwards became to the political leaders, to the judges and lawyers, and to the entire mass of the men of England in later ages."<sup>113</sup>

## Conclusion

Exactly what McKechnie meant by "the men of England" in this context is perhaps best left for another occasion. It is not impossible that in his mind the men (and women) of Scotland were subsumed by the description. But this present piece has sought to show that the people of Scotland have never looked to Magna Carta for their personal and political liberties; nor have their lawyers ever placed it on a constitutional pedestal. For good or ill, in Scotland until the 1707 Union liberty and freedom were seen predominantly in the national and political context of the country's relationship with England. Personal freedom from state control was important, especially in matters of religion, but that led to nothing parallel with Magna Carta; the National Covenant of 1638 and the Solemn League and Covenant of 1641 were quite different creatures from the Great Charter.

In a formal sense at least it is clearly wrong for David Carpenter to say that the un-repealed chapters of Magna Carta (Chapters 1, 39 and 40) "are still part of the law of the United Kingdom today". They are not, and never have been, part of the law of Scotland. This is not to say that the principles embodied in these chapters are not to be found in Scots law (although the privilege of trial by peers was abolished for Scotland by section 28 of the Juries Act 1949).<sup>114</sup> But the original source and authority for these principles in Scotland did not derive from Magna Carta; even, it would seem, by way of imitation. Almost alone in the early modern

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<sup>110</sup> McKechnie's other books are *The State and the Individual* (Glasgow: James Maclehose & Sons, 1896); *The Reform of the House of Lords* (Glasgow: James Maclehose & Sons, 1909) and *The New Democracy and the New Constitution* (London: John Murray, 1912).

<sup>111</sup> Two of McKechnie's observations may be quoted for their current resonance: "The adage that 'threatened men live long' applies with peculiar force to the House of Lords" (*Reform of the House of Lords*, p. 1); "[A]rgument leaves consistent adherents of democracy no loophole of escape from the principle of the Referendum" (*New Democracy*, p. 12).

<sup>112</sup> D. M. Walker, *A History of the School of Law, The University of Glasgow* (Glasgow: University of Glasgow, 1990) p. 63. See especially McKechnie, *Magna Carta*, pp. 109-129.

<sup>113</sup> McKechnie, *Magna Carta*, p. 134. The same sentence appears at p. 158 of the first edition.

<sup>114</sup> See further Willock, *Jury in Scotland*, pp. 179-83. The privilege seems never to have extended beyond those who could be styled "peers".



English-speaking legal world, therefore, Scots lawyers gave the great medieval charter of liberties no particular standing. It is difficult to know whether this was because of, or despite, the Anglo-Scottish agreement of 1707 and the ever-closer union which for a long time that appeared to herald. But it is certain that Magna Carta was at its most important for Scotland in the year of its creation, and that that importance probably did not long outlive King John.